



THOMPSONS
S O L I C I T O R S

The Enterprise and Regulatory Reform Act 2013

- 47(2) HSWA 1974:
“Breach of a duty imposed by Health and Safety Regulations shall so far as it causes damage, to be actionable except insofar as the Regulations provide otherwise”
- S.47(2) of the HSWA 1974 now stands amended by S.69 of the Enterprise and Regulatory Reform Act 2013. (*ERRA*)

- S.69 of the *ERRA* reverses that presumption. Health and Safety Regulations made under that Act (including the six pack regulations) and any pre-existing statutes i.e. Factories Act etc, will not impose civil liability, unless civil liability is expressly included.
- We will no longer be able to rely on a breach of these Health and Safety Regulations to impose liability. Claims for breach of statutory duty for workplace accidents are, effectively, abolished.

- Instead claimants will need to prove **negligence** at Common Law.
- This applies to all claims for accidents and breaches of duty, for example in disease claims **after 1st October 2013.**

- *Note-* employers retain potential *criminal* responsibility for breaches of the relevant Regulations...
- *But-* Professor Lofstedt, in his report on health and safety noted 1,000 health and safety prosecutions per year (a figure which pre-dates a 25% cut in funding for the HSE), as opposed to some 78,000 civil claims.

- Not inherently unreasonable to argue that a defendant should have to comply with the same standards in a *civil* context.
- However there is **loss of strict liability**, for example Regulation 5 of the Provision and Use of Work Equipment Regulations in relation to the maintenance of work equipment.

- Even now if there is a clear breach of the Regulations; the burden will now still fall on the claimant to establish **foresight** of harm ie: defendant's knowledge.
- Cases could not be decided the same way under the new regime i.e. Dugmore v Swansea NHS Trust [2002]; C suffers anaphylactic attack when picking up an empty box that had contained latex gloves.

Dugmore v Swansea NHS Trust

[2002]

- Hale LJ -Held the statutory framework existed to ensure that exposure to hazardous substances was prevented or adequately controlled; *foreseeability of risk* simply not relevant.
- Defendant bears the burden of proving that compliance was not reasonably practicable; but..
-the position is different at common law where the claimant bears the burden of proving all aspects of the claim.

Pursuing workplace claims
without the benefit of
breach of statutory duty

- Two questions to ask when dealing with breach of duty in a negligence claim:
 1. Is there a reasonable & foreseeable risk of injury sufficient to trigger an obligation on the employer to do something about it.
 2. If so, has the employer taken reasonable steps to remove or reduce that risk of injury?

- Regulations required that certain states **had** to be maintained by the employer.
- In a claim under the MHOR 1992, C needed to merely establish that they were injured by a manual handling task that posed a risk of injury.
- Burden will then shift to the defendant to prove that it had reduced the risk to the lowest level reasonably practicable. Difficult burden to shift – see *O’Neill v DSG Ghith v Indesit*.

What evidence will now be required to establish breach?

- Consider a repetitive strain injury due to a manual handling task occurring post ERRA.
- Will not be enough for C to merely argue that D *could* have employed different lifting method. Has to show that there was a *significantly known danger* to place D under an obligation to ameliorate risk. These would be evidence of appropriate standards.

Documents as Evidence of Appropriate Standards

- Codes of Practice and guidance notes which accompany the Regulations.
- HSE Guidance and Industry Standards.

Common Law Duties

- Classic authority for this remains the House of Lords' decision in Wilsons & Clyde Coal Company v English [1938] AC 57. This imposes on the employer's duties to:
- Provide and maintain a safe place of work and equipment;
- Establish and enforce a safe system of work;
- Provide competent fellow employees.

Common Law Duties

- The standard of care is that of the 'reasonable' employer ie: what he ought reasonably to know about.
- Evidence of previous accidents and complaints now likely to be essential evidence.

- Disclosure-going to Health and Safety will now take on greater importance – for example Health and Safety Committee minutes, surveys etc. Union can help with this.

Emanations of the State

- There is a possible (and rather important) exception. In any case where the D is an “Emanation of the State” European Law has direct effect.
- Privatised utility industries may be included, as well as, more obviously, employers such as Local Authorities, Health Service Trusts , Government Departments, Police Forces, Fire Brigades, Prisons, Court Service etc

Emanations of the State

- Relevant European directives could include; Manual Handling Directive (90/269/EEC), Personal Protective Equipment at Work Directive (89/656/EC), Workplace Directive (89/654/EEC)

Emanations of the State

- “Direct Effect” claims may not be as prevalent as envisaged.
- Firstly, judges are unlikely to feel comfortable with enforcing “health and safety apartheid”.

Emanations of the State

- Many judges were uneasy with strict liability, unlikely to be keen to see it reintroduced.
- Thirdly, not all directives (or parts of the directives) are directly effective.
- Specific exclusions – for example para. 2.2(c) of the PPE Directive, excludes the police from application.

Emanations of the State

- In any event, Claimants will lose “additional protection” provided by domestic Regulations.

E.g. – the Workplace Directive concerned itself with the actual construction of the floor of the workplace, not things placed or dropped on the workplace floor (no Reg 12(3) claims under direct effect!).

Emanations of the State

- *Dugmore v Swansea NHS Trust* [2002]
LJ Hale-the European Directives had nothing in them which was comparable to the protection offered under Regulation 7 of the Control of Substances Hazardous to Health Regulations.

SOME CASE STUDIES

Case Study 1

Mr Stick works as a bicycle courier for BikeltFast Co. He is provided with a bicycle by his employers which is 7 years old. His employers have a system whereby the bicycle is regularly checked and maintained and this system is carried out. Nevertheless, whilst he is riding it one day, the front wheel shatters and he is thrown to the ground and injured.

Case Study 1

The evidence is that the cause of the wheel shattering was a defect which could not have been identified by a reasonable inspection or maintenance system

Case Study 1

- Would his claim have succeeded in the past i.e. for accidents before 1st October 2013?
- Will his claim succeed after 1st October 2013? Why?

Case Study 1

- If Mr Stick is injured in these circumstances working for the Post Office after 1st October 2013, would that effect your answer? Why?

Case Study 2

Hassan works for Quagmire Plc at their factory premises. He is asked by his supervisor to locate a particular piece of equipment which has not been used for some time. His supervisor tells him that it might be in the area used to store things no longer in use. This is an area of the factory rarely visited by anyone. Hassan entered this area which had shelving with walkways between.

Case Study 2

Hassan steps off the main walkway to walk down the aisle between two sets of shelves.

Half way down the aisle he catches his foot in a hole on the floor and falls, sustaining injury. The hole is measured as being about a half an inch deep and an inch in diameter.

Case Study 2

- There is no evidence about how it came about or how long it had been there, but the area is subject to six monthly health and safety inspections. The last inspection took place 5½ months ago and did not identify the presence of the hole.

Case Study 2

- Will Hassan's claim have succeeded for accidents before 1st October 2013? If so, on what basis?
- Will his claim succeed after 1st October 2013? Why?

Case Study 2

- If Hassan was working for a privatised utility company at the time of the accident, would that make any difference to liability after the 1st October 2013?

Union Legal Services

Thompsons provide the following legal services to union members:

- Personal injury claim procedures
- Criminal representation and advice
- Employment advice

Union legal Services – Personal Injury

What is covered?

- Workplace Accidents
- Occupational Disease Claims e.g. stress.
- Workplace Assaults
- Road Traffic Accidents
- Holiday Accidents
- Slip, Trip & Falls
- Injuries caused by Defective Goods
- Food Poisoning

Legal Services – Personal Injury

Who Can Claim?

- Anyone who is a union member.
- For non-work related accidents, family members are also covered; immediate family, blood relation or anyone else considered to be part of the family.

Legal Services – Personal Injury

What does the service cover?

- Compensation for personal injuries up to and including court proceedings, where necessary.
- There are no hidden costs – it is a free service.
- Members and their families get to keep 100% of their compensation.

Legal Services – Personal Injury

Time Limits

- Time limit of 3 years from the date of an accident in which to issue court proceedings.
- In disease claims – 3 years from the date that C ought to have known they had suffered a significant injury that was likely to be related to the work environment.

Other Legal Services.

- Free Wills service for members.
- Conveyancing at competitive fixed price rates for members and their families.
- Free legal advice by telephone on any non-employment subject – a half hour advice session.